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DISCUSSION RESPONSE

Customary international law identification as constrained law-making

CURTIS BRADLEY — 26 October, 2015

A response to David Koppe

There has been a resurgence of interest in recent years in how customary international law is identified, and this interest will likely intensify as a result of the International Law Commission's current work on the subject. Somewhat ironically, this resurgence of interest comes at a time when there are increasing doubts about the continued usefulness of customary international law in addressing the world's problems, and about whether the traditional doctrinal tests for customary international law need to be reconsidered. These doubts, and potential responses to them, are

considered in a forthcoming book that I have edited, *Custom's Future: International Law in a Changing World*.

The blog post on "Ascertaining customary international law" suggests that the identification of norms of customary international law involves a 'process of rhetoric'. I tend to agree, but I think this insight can be taken further.

No customary law, including customary international law, exists in the abstract. There may be customary practices, but they do not operate in a self-liquidating manner to produce law. Even when customary law is identified inductively (which is often not the case), it requires an interpreter to, among other things, characterize the relevant practice at a particular level of generality. That characterization inevitably is affected by considerations outside of the inductive enterprise, including consequentialist considerations about the impact on states of particular formulations.

Many efforts to identify customary international law are not inductive at all, and, contrary to what debates about "old" versus "new" custom might suggest, this is not a new phenomenon. Legal disputes between states often arise precisely because there is no clear practice on point, either because the practice in question is new, conditions have changed in a way that alters the benefits or burdens of a particular practice, or there was no previous need to determine whether the practice had legal status. In these situations, discerning customary international law does not involve the application of settled norms of practice followed out of a sense of legal obligation. Instead, it involves, for example, appeals to general principles or baselines that purportedly have widespread acceptance, and a contention

that those principles or baselines have particular implications for the context at hand.

There is, in other words, a substantial amount of creativity in the identification of norms of customary international law. To put it differently, the interpretation of customary international law is, in part, a law-making, and not merely law-identifying, exercise. This means that, despite applying purportedly similar standards, different institutional actors are likely to identify norms of customary international law differently. There is simply no such thing as "customary international law" divorced from an interpretive and institutional context. The law-making aspect to the identification of customary international law also means, as I have suggested elsewhere, that the identification of customary international law by international courts is likely to resemble the judicial development of the common law: that is, an approach whereby adjudicators look to past practice but necessarily make choices about how to describe it, which presumptions to apply in evaluating it, and whether and when to extend or analogize it to new situations.

This does not mean that there are no constraints on the creative aspects of the identification of customary international law. Ultimately, appeals to customary international law depend on a certain level of acceptance in the international community. As a result, interpreters who stray too far from state preferences (including about what is considered socially and morally desirable) are likely to be ineffectual and may even generate a backlash. This is likely one reason that interpreters often rely heavily on widely-ratified treaties as evidence of customary international law: the treaties are evidence that particular norms have substantial international support. International courts also

face other constraints, such as the constraints associated with the adjudicative process itself (including jurisdictional restrictions), the expectation of a certain type of public reasoning, and the heavy dependence of many of these courts on voluntary compliance.

Understanding the identification of customary international law as a type of constrained law-making rather than as something simply discerned based on the "two elements" of practice and *opinio juris* helps resolve a variety of conceptual and evidentiary puzzles. Perhaps most notably, it helps resolve the famous "chronological paradox," pursuant to which it is uncertain how rules of customary international law can form if they can exist only when a practice is already followed out of a sense of legal obligation. The answer is that, in practice, the modern two element definition of customary international law does not in fact describe how norms of customary international law are identified. Of course, the two-element definition might be a useful fiction in addressing concerns about the legitimacy of customary international law, which is less consensual than treaty-making, or about the discretion exercised by international adjudicators. But theorists of international law should be willing to recognize that it is, in fact, a fiction. The blog post on "Ascertaining customary international law" is a step in the right direction.

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